

19th JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

NUMBER 632170

SECTION 27

NAVIS HILL, ET AL

VERSUS

BOBBY JINDAL, IN HIS OFFICIAL CAPACITY AS GOVERNOR, STATE OF
LOUISIANA, ET AL

THIRD PARTY DEMAND
FOR DECLARATORY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes Louisiana Governor Bobby Jindal appearing as Third-Party Plaintiff, who moves pursuant to La. C.C.P. art. 1871 and 1872 to interpret and declare invalid and unenforceable the “Memorandum of Understanding” of June 8, 2010, between the State of Louisiana and other member states of the Partnership For Assessment of Readiness for College and Careers (“PARCC”), on the following grounds:

Third-Party Defendant

1.

Made Third-Party Defendant is the Louisiana State Board of Elementary and Secondary Education ("BESE"), a body corporate with its domicile and principal place of business in the Parish of East Baton Rouge, created by Article 8, Section 3 of the Louisiana Constitution of 1974.

The Authority Paradigm For Educational Policy

2.

Article VIII, § 1 of the Constitution of Louisiana provides that “[t]he legislature shall provide for the education of the people of the state and shall establish and maintain a public education system.”

3.

Article VIII, § 2 establishes the office of the superintendent of education to serve as the administrative head of the Department of Education and to “implement the policies of the State Board of Elementary and Secondary Education (“BESE”) and the laws affecting schools under its jurisdiction.”

4.

Article VIII, § 3 provides that BESE shall “supervise and control the public elementary and secondary schools and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, *all as provided by law.*” (Italics added).

5.

BESE’s authority over educational policy is “subject to the direction of the legislature.” Aguillard v. Treen, 440 So.2d 704, 709 (La. 1983).

6.

The legislature’s direction to BESE for developing and implementing educational policy is found in Title 17 of the Louisiana Revised Statutes. For instance, BESE is charged with responsibility for “all planning functions for the Department of Education, including collection, analysis and interpretation of all data, information, test results, evaluations, and other indicators that are used to formulate policy, identify areas of concern and need, and serve as the basis for short-range and long-range planning” (La. R.S. 17:7(1)(c)) and to “[a]pprove courses of study and prepare and adopt rules and regulations for the discipline of students and the governance of the public elementary and secondary schools and other public schools and programs under its jurisdiction.” La. R.S. 17:7(5)(a).

7.

BESE has no authority to delegate or assign to any person or entity its obligations for developing and implementing educational policy as provided by the constitution and the legislature.

Student Assessments

8.

In 1980, the legislature enacted the Louisiana Competency-Based Education Program to define BESE's authority over the development and implementation of statewide content standards, special education programs, teacher education programs, and the Louisiana Educational Assessment Program ("LEAP"). La. R.S. 17:24.4.

9.

In 2012, the legislature amended the provisions for the LEAP program to require that the assessments implemented by BESE for "English language arts and mathematics shall be based on nationally recognized content standards that represent the knowledge and skills needed for students to successfully transition to postsecondary education and the workplace. Rigorous student achievement standards shall be set with reference to test scores of the same grade levels nationally." La. R.S. 17:24.4(F)(1)(d).

10.

Although requiring "nationally recognized content standards" for LEAP assessments, the legislature has not mandated or endorsed any particular assessment product, vendor or methodology. That responsibility lies with the elected members of BESE, who must implement the legislature's stated policy in accordance with law.

**Common Core and Race to the Top -
Good Intentions Co-opted by Federal Coercion**

11.

In 2009, the National Governor’s Association’s Center for Best Practices and the Council of Chief State School Officers founded the Common Core State Standards Initiative (“CCSSI”) to create a set of uniform standards that could be *voluntarily* used by the states to improve the quality of public education (“Common Core standards”). At base, the Common Core standards were designed to define the knowledge and skills students should have in their K-12 education in order to graduate from high school and to succeed in entry-level, credit bearing college courses and in workforce training programs.

12.

For purposes of development and receipt of public comments, the writers of the Common Core standards divided the standards into two categories: (1) college- and career-ready standards, which address what students are expected to have learned upon graduation from high school; and (2) K-12 standards, which address expectations for elementary school through high school. Announced on June 2, 2010, the final K-12 Common Core standards incorporated the college- and career-ready standards.

13.

In 2009, President Obama signed into law the American Recovery and Reinvestment Act, which provided funds for the Obama Administration’s Race to the Top program. The program included the Race to the Top Fund and the Race to the Top Assessment Program. The Race to the Top Fund consisted of \$4 billion to disburse to states that agreed to comply with certain programmatic and substantive requirements. The Race to the Top Assessment Program provided \$362 million in funding “to

consortia of states to develop assessments . . . and measure student achievement against standards designed to ensure that all students gain the knowledge and skills needed to succeed in college and the workplace.” 75 Fed. Reg. 18, 171 (April 9, 2010).

14.

The Race to the Top Fund included several “priorities.” Priority 1 is an “absolute priority” for a Comprehensive Approach to Education Reform. Priority 2 is a “competitive preference priority” for Emphasis on Science, Technology, Engineering, and Mathematics. Priorities 3-6 are “invitational priorities,” respectively, relating to innovations in early learning, the expansion and use of longitudinal data systems, coordination of elementary and secondary education with post-secondary learning, and school-level reform. *See* 74 Fed. Reg. 59, 836-59, 837 (Nov. 18, 2009).

15.

To satisfy the State Reform Conditions Criteria for Race to the Top funding, states are required to adopt common K-12 standards. Guidance provided by the U.S. Department of Education to the peer reviewers for scoring Race to the Top applications effectively compels states to adopt a single, nationalized set of standards: A state earns “high” points if it is part of a standard consortium consisting of a majority of states that jointly develop and adopt common standards, while a state earns “medium” or “low” points “if the consortium includes one-half of the States in the country or less.” In addition, the “internationally benchmarked standards” refer to a “common set of K-12 standards” that the U.S. Department of Education defines as “a set of content standards that define what students must know and be able to do and that are substantially identical across all states in a [standards] consortium.” *Id.*

The PARCC Memorandum of Understanding

16.

In June 2010, the State of Louisiana entered a “Memorandum of Understanding” (the “PARCC Memorandum” or “MOU,” copy attached as Exhibit “A”) with other states to participate in a “Consortium” to receive grant funding under the Race to the Top Assessment Program for the study and design of standardized assessment tests. The organization of states is referred to as the “Partnership For Assessment of Readiness for College and Careers” (“PARCC”).

17.

Participation in PARCC was promoted as “voluntary,” although its terms clearly provide otherwise. Moreover, the federal purse strings to Race to the Top funding effectively compelled participation by the states.

18.

The PARCC Memorandum requires participating states to “support the work of the Consortium,” which includes meeting the following objectives:

- A. The Consortium shall develop procedures for the administration of its duties, set forth in By-laws, which will be adopted at the first meeting of the Governing Board.
- B. The Consortium shall adopt common assessment administration procedures no later than the spring of 2011.
- C. The Consortium shall adopt a common set of item release policies no later than the spring of 2011.
- D. The Consortium shall adopt a test security policy no later than the spring of 2011.
- E. The Consortium shall adopt a common definition of “English learner” and common policies and procedures for student participation and accommodations for English learners no later than the spring of 2011.
- F. The Consortium shall adopt common policies and procedures for

student participation and accommodations for students with disabilities no later than the spring of 2011.

- G. Each Consortium state shall adopt a common set of college- and career-ready standards no later than December 31, 2011.
- H. The Consortium shall adopt a common set of common performance level descriptors no later than the summer of 2014.
- I. The Consortium shall adopt a common set of achievement standards no later than the summer of 2015.

Section VI.

19.

As a “Governing State” under the PARCC Memorandum, Louisiana agreed to “not be a member of any other consortium” making application for Race to the Top funding and to implement the “administration of the assessment system developed by the Consortium,” among numerous other commitments. Section VII, A(1).

20.

PARCC is administered by a “Governing Board” that consists of the chief state school officer or designee from each Governing State. Section VIII. According to the PARCC Memorandum, the “Governing Board shall make decisions regarding major policy, design, operational and organizational aspects of the Consortium’s work,” including design of assessments, common achievement levels, procurement strategy, and policies and decisions regarding control and ownership of intellectual property. Section VIII, A.

21.

Decisions of the PARCC Governing board “shall be made by consensus; where consensus is not achieved among Governing States, decisions shall be made by a vote of the Governing States. Each State has one vote. Votes of a super majority of the

Governing States are necessary for a decision to be reached.” A super majority is defined as “a majority of Governing States plus one additional State.” Section VIII, A(7).

22.

Section X of the PARCC Memorandum provides for “Binding Commitments and Assurances” of the participating states, which includes a certification that each state “[w]ill cooperate fully with the Consortium and will carry out all of the responsibilities associated with its selected membership classification.”

23.

Section XIV of the PARCC Memorandum provides that the PARCC Governing Board shall have final authority over all conflicts regarding interpretations of the agreement and that such decisions shall not be “subject to further appeal or to review by any outside court or other tribunal.”

24.

A participating state may withdraw from the PARCC Memorandum only upon agreement of “the individuals holding the same position that signed the MOU.” Section VII, D. The PARC Memorandum was signed on behalf of Louisiana by Governor Jindal; then-president of BESE, Keith Guice; and then-superintendent of education, Paul Pastorek. The current president of BESE and the current superintendent of education have ratified the PARCC Memorandum.

25.

Based on the conditions and implementation of the Race to the Top Program, which effectively coerce states to develop a single nationalized standard for education assessments, and the terms of the PARCC MOU, which effectively subject citizens of Louisiana to binding education policy developed by a private non-Louisiana entity, the

Common Core goal of creating “voluntary” standards to assist states has been lost.

26.

Governor Jindal has publically withdrawn his support for the PARCC Memorandum based on the now-clear intention of the Obama Administration to federalize education policy in contravention to the sovereign authority of the State of Louisiana.

27.

In addition, a dispute concerning state procurement law and implementation has arisen as direct result of the purported commitments under the PARCC Memorandum, as demonstrated by the allegations of the underlying principle demand.

Declaratory Judgment

28.

The Supreme Court of Louisiana has clearly established that constitutional authority granted to a political office or agency cannot be delegated or assigned “either to the people or to any other body of authority.” Krielow v. Louisiana Dep't of Agric. & Forestry, 2013-1106 (La. 10/15/13); 125 So.3d 384, 389 (Declaring unconstitutional statutes that impermissibly delegated legislative authority to private persons and to public boards), and City of Alexandria v. Alexandria Firefighters Assn., 220 La. 754, 57 So.2d 673 (1952) (Declaring unconstitutional a statute that permitted firemen to vote on maximum number of hours they would be required to work under the statute).

29.

While the delegation of certain administrative functions to another public body may be permitted, the prohibition against delegation of authority to a non-public person or entity is absolute: “The power conferred upon the majority is, in effect, the

power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interest may be and often are adverse to the interest of others in the same business.” Krielow, at 390 (*quoting* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)). “Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.” Association of American Railroads v. United States Department of Transportation, 721 F.3d 666 (D.C. Cir. 2013).

30.

Delegating governmental authority to private citizens “saps our political system of democratic accountability.” Association of American Railroads, at 674. “This threat is particularly dangerous where both Congress and the Executive can deflect blame for unpopular policies by attributing them to the choices of a private entity.” Id. In addition, “fundamental to the public-private distinction in the delegation of regulatory authority is the belief that disinterested government agencies ostensibly look to the public good, not private gain. For this reason, delegations to private entities are particularly perilous.” Id. *See also* Texas Boll Weevil Eradication Found. v. Lewellen, 952, S.W.2d 454, 475 (Tex. 1997) (striking down an act of the legislature authorizing the creation of the Official Cotton Growers’ Boll Weevil Eradication Foundation as an overbroad delegation of power to private parties), and General Elec. Co. v. New York State Dep’t of Labor, 936 F.2d 1448, 1455 (2d Cir. 1991) (“[A] legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties’ discretion.”).

31.

BESE is constitutionally required by Article VIII, §3 to develop and to implement educational policy under the direction of the legislature. And the superintendent is required by Article VIII, §2 to implement the policies of BESE.

32.

Under the PARCC Memorandum, BESE's obligation to develop and to implement the policy established in La. R.S. 17:24.4(F) has been effectively assigned to the PARCC Governing Board, a private non-Louisiana entity.

33.

The PARCC Memorandum is invalid and unenforceable under Louisiana law because it purports to delegate the constitutional authority of BESE and the legislature to a private entity governed by persons representing other sovereigns with potentially conflicting interests.

WHEREFORE, Third-Party Plaintiff, Louisiana Governor Bobby Jindal, respectfully prays for judgment as follows:

1. A declaration that the Memorandum of Understanding is invalid and unenforceable; or, alternatively
2. A declaration of the rights of the State of Louisiana under the Memorandum of Understanding and the legal relationship between the parties to the Memorandum of Understanding; and

3. Any other equitable and general relief deemed just and proper.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANT, BOBBY
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GOVERNOR, STATE OF LOUISIANA**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Third Party Demand for Declaratory Judgment has this date been served upon all known parties by electronic mail and by placing a copy of same into the United States Mail, first class postage prepaid and properly addressed, to:

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Alexandria, Louisiana, this ____ day of _____, 2014.

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